2005 WL 6341778 (Idaho Dist.) (Trial Motion, Memorandum and Affidavit)
Idaho District Court.
Fourth Judicial District
Ada County

Reed TAYLOR, Dallan Taylor, and R. John Taylor, Plaintiffs/Counter-Defendants,
v.
Thomas MAILE, IV and Colleen Maile, husband and wife, Thomas Maile Real Estate Company, and Berkshire Investments, LLC, Defendants/Counter-Claimants.
Theodore L. JOHNSON Revocable Trust, Plaintiff,
v.
Thomas MAILE, IV and Colleen, Maile, husband and wife, and Berkshire Investments, LLC, Defendants.

No. CV OC 0400473D.
March 2, 2005.

Memorandum in Opposition to Defendants' Motion to Dismiss/ Motion for Summary Judgment and Motion for Partial Summary Judgment

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COMES NOW Plaintiff Theodore L. Johnson Revocable Trust (hereinafter referred to as “Trust”), by and through its attorney of record, Paul Thomas Clark of the firm of Clark & Feeney, and submits this Memorandum in Opposition to Defendants' Motion to Dismiss / Motion for Summary Judgment, and Motion for Partial Summary Judgment.

I. SUMMARY OF FACTS

Please see the Summary of Facts and Exhibits filed herewith, incorporated herein and attached as Exhibit A for the court's convenience.

II. LEGAL STANDARDS TO BE APPLIED TO DEFENDANTS' MOTIONS

A. LEGAL STANDARD FOR MOTION TO DISMISS

The Defendants have not attempted to separate their Motion to Dismiss from the Motion for Summary Judgment, and have submitted a number of affidavits and attachments in support of these motions. This requires that the Motion to Dismiss be treated as a Motion for Summary Judgment, and that the standard for summary judgment be applied to that motion as well. *See Thompson v. Lewiston,* 137 Idaho 473, 474 (2002), in which the Idaho Supreme Court affirmed a district court decision treating a motion to dismiss based upon the question of whether the plaintiff had standing to sue as a motion for summary judgment:

B. MOTION FOR SUMMARY JUDGMENT STANDARD

I.R.C.P. Rule 56(a) provides in pertinent part as follows:

> A party seeking to recover upon a claim, counterclaim, or crossclaim, or to obtain a declaratory judgment may, at any time after the expiration of twenty (20) days from the service of process upon the adverse party

> or his appearance in the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof...

A motion for summary judgment is to "be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c); *State v. Continental Casualty Co.*, 121 Idaho 938, 939, 829 P.2d 528 (1992). In determining whether there exists a genuine issue as to any material fact and whether the defendants are entitled to judgment as a matter of law, this Court is required to look to the totality of the record including motions, affidavits, depositions, pleadings and exhibits, and not to isolated portions of the record. *Id.*, citing *Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171 (1986).

The burden of proving the absence of a material fact rests at all times upon the moving party. *Harris v. State Dept. of Health*, 123 Idaho 295, 298, 847 P.2d 1156 (1992). This burden is onerous because even circumstantial evidence can create a genuine issue of material fact. *Harris, supra, citing McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). This Court is required to liberally construe facts in the existing record in favor of the Trust on this motion, and to draw all reasonable inferences from the record in its favor (*Bonz v. Sudweeks*, 119 Idaho 539, 808 P.2d 876 (1991)).

III. ARGUMENT

A. TAYLORS' STATUS AS TRUSTEE.

As this Court will recall, the Defendants' argument in Taylor v. Maile, et al. was that only the Trustee had standing to bring suit in this matter. Based on that position, all of the beneficiaries of the Theodore L. Johnson Trust entered into an agreement under which the Taylors were expressly authorized to pursue this lawsuit on behalf of the Trust. See the Disclaimer, Release & Indemnity Agreement attached as Exhibit 2(M) to Submission of Deposition and Exhibits dated March 1, 2005. Mr. Maile acknowledges that he has received a copy of all of the beneficiaries' signatures.

1. There Is a Valid Court Order Appointing the Taylors as Trustees Effective as of June 10, 2004.

The Honorable Chris Beiter, Ada County Magistrate Judge, entered an order on November 17, 2004, which appointed John, Reed and Dallan Taylor as Trustees, effective as of June 10, 2004. This was clearly the intent of the Trustees and all of the beneficiaries of the Trust, as evidenced by the Disclaimer, Release and Indemnity Agreement. Maile has filed an objection to the entry of that order, but the matter has not yet been heard. Unless and until an order is entered by Judge Beiter, the order of appointment is valid. That order may be set aside only by Judge Beiter or by an appellate court reviewing his decision.

It should be noted that in objecting to this appointment, which was made at their insistence, the Defendants have not raised any concern as to the qualification of the current trustees, nor have they proposed that some other person or persons should have been appointed. The sole basis of the objection is the existence of this lawsuit and their desire to have it dismissed. Plaintiffs submit that to be an inappropriate basis for an objection and a misuse of the judicial system.

2. Defendants have no standing to object to the appointment of Trustees.

Although the validity of Judge Beiter's order is not a matter which may properly be decided in this proceeding, Plaintiffs dispute the Defendants' assertion that they were entitled to notice of the Petition for Appointment of Trustees.

There is no merit to the argument that Maile and/or his various entities were entitled to notice as an "interested person" under I.C. § 15-1-201. That statute defines "interested person" as follows:

> ... heirs, devisees, children, spouses, creditors, beneficiaries and any other having a property right in or claim against a trust estate or the estate of a decedent, ward or protected person which may be affected by the proceeding....

I.C. § 15-1-201(24) in pertinent part.

There is no dispute that the parties have been involved in litigation relating to the real property which was owned by the Trust and purchased by an LLC owned by Mr. Maile. However, at this point there have not been any determinations as to the merit of either party's claims. Neither the Mailes nor Berkshire Investments, LLC currently has a property right in the Trust Estate. They have nothing more than inchoate, unproven allegations which do not rise to the level of being a "claim against a trust estate."

The word "claim" is defined in I.C. § 15-1-201(5) as follows:

"Claims," in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, other tax obligations arising from activities or transactions of the estate, demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

I.C. § 15-1-201(5).

By its plain language, this statutory definition of "claims" applies only to "estates of decedents and protected persons," neither of which are involved in this matter. The mere existence of a dispute which has not yet been resolved does not constitute a "claim" under the language of the statute. Liabilities only qualify as a "claim" if they are the liabilities of a decedent or protected person, neither of which are applicable in this case. The statute specifically excludes "demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate." The allegations and assertions in the Defendants' Answer and Counterclaim in Johnson Trust v. Maile do not meet the definition of claims under this statute.

The Defendants have not cited any statute or case law which supports their contention that the mere fact that a lawsuit is pending means that they are "creditors" of the Trust. See p. 6, Supplemental Memorandum in Support of Defendants' Motion to Dismiss/ Motion for Summary Judgment. They have cited no cases whatsoever relating to the meaning of the term "interested person" as it relates to a trust rather than to a decedent's estate. The plaintiff in *Thornton v. Estate of Thornton*, which Defendants cite, was not found to be an interested person merely because she had filed a lawsuit. Her standing was based upon the fact that she and her now-deceased ex-husband had entered into a Settlement Agreement and Mutual Release which stated: "Any claim Thornton [Laura] may have for a share of any property not disclosed at the trial of this case is specifically reserved, and this release does not affect any such future claims." There is no such agreement in this case, and the existence of claims which have not yet been found to be meritorious does not make the Defendants "interested persons."

Because they have not obtained a judgment, neither Mr. Maile nor any of his entities qualify under the statute as "interested persons" who were entitled to receive notice. All of the beneficiaries agreed to the Taylors being appointed effective June 10, 2004, for the specific purpose of pursuing a lawsuit relating to the Trust property purchased by Maile. Maile and Berkshire simply have no standing to object to this appointment.

3. Trustees' Power to Delegate Authority.

Under I.C. 68-106(c)(25), trustees have the power to prosecute or defend actions, claims, or proceedings for the protection of trust assets and of the trustee in the performance of his duties. The Disclaimer, Release and Indemnity Agreement clearly shows

that the resignation of the previous trustees was conditioned upon the Taylors taking their place for the purpose of pursuing this lawsuit. Such a delegation is permissible under Idaho law.

Beginning at page 7 of their Supplemental Memorandum, the Defendants cite cases from a number of states for the proposition that "a trustee simply does not have the power to delegate to others the power to exercise his discretionary functions." There are no Idaho cases cited because the law is different in Idaho. The Defendants have failed to cite the Idaho statute which is directly on point and directly contrary to this position. Under Idaho Code 68-106(c)(24), Trustees have the power to:

> employ persons, including attorney, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, **whether or not discretionary.**

I.C. 68-106(c)(24) emphasis added.

The Defendants' argument that the Trustees did not have the authority to delegate discretionary functions is just flat wrong and ignores the plain language of the statute. Regardless of Judge Beiter's order appointing the Taylors as Trustees effective as of June 10, 2004, the previous trustees clearly were within their authority in delegating the pursuit of this action to the Taylors.

B. MAILE'S LIABILITY FOR LEGAL MALPRACTICE

There are genuine issues of material fact as to whether Mr. Maile is liable for a breach of his fiduciary duties, self-dealing, and/or negligence in his capacity as an attorney.

The elements required to establish a claim for attorney malpractice arising out of a civil action are: (1) the creation of an attorney-client relationship; (2) the existence of a duty on the part of the lawyer; (3) the breach of the duty or of the standard of care by the lawyer; and (4) the failure to perform the duty must have been a proximate cause of the damages suffered by the client. *Marias v. Marano, 120 Idaho 11,* 13, 813 P.2d 350, 352 (1991); *Johnson v. Jones, 103 Idaho 702,* 706,652 P.2d 650, 654 (1982).

1. Expert Affidavit Regarding Duty.

Expert evidence of negligence and causation is required to establish a prima facie case of legal malpractice. Where a defendant attorney moves for summary judgment in a malpractice case, the plaintiff must ordinarily provide affidavits of expert witnesses to resist the motion. *Samuel v. Hepworth,* 134 Idaho 84, 89 (1999), citing *Jarman v. Hale,* 112 Idaho 270, 273, 731 P.2d 813, 816 (Ct. App. 1986). The reason for these requirements, ***as in malpractice actions against other professionals,*** is that "the factors involved ordinarily are not within the knowledge or experience of laymen composing the jury." *Samuel, supra.* Expert testimony is unnecessary where the attorney's breach of duty of care is so obvious that it is within the ordinary knowledge and experience of laymen. *Jarman I,* 122 Idaho at 273, 731 P.2d at 816.

The Plaintiffs in this case have submitted the Affidavit of Richard Mollerup, who expresses the expert opinion that Mr. Maile violated his fiduciary duties, violated his ethical duties, and was negligent, all of which were the proximate cause of damages to the Plaintiff. This affidavit alone is sufficient to establish a genuine issue of material fact on Plaintiff's cause of action.

Mr. Mollerup's review of the documents surrounding the Purchase and Sale of the Linder Road property reveals that the documents drafted by Maile were not standard language documents and were more favorable to the Maile/Berkshire Investments than the seller.

The Purchase Agreement contained provisions that Mr. Mollerup describes as "fairly harsh and extremely unusual." The unusual provisions were also not conspicuously identified but buried within the document. See Affidavit of Richard Mollerup dated March 1, 2005.

Mr. Mollerup also states that the Deed of Trust attached as Exhibit A-2 to the Purchase Agreement and drafted by Maile is "an extreme deviation from any standard form deed of trust." The deed of trust eliminated provisions that would protect the parties, the Trust in particular.

The Release and Reconveyance drafted by Maile and signed by Sherer without the consent of Beth Rogers was a "very unusual document" and "attempts to go far beyond the duties of a normal trustee in a deed of trust and appears to be an attempt to a full release of all liabilities of any claim predicated on obligation referenced in the deed of Trust including the real property described therein or any other claim arising out of the transaction." Affidavit of Mollerup, pg. 8, ¶ 5.e

It is Mr. Mollerup's opinion that the terms under which Maile/Berkshire Investments, Inc. purchased the property from the Trust was not fair and reasonable and that Maile breached his fiduciary obligations.

2. Issues and Duties Owed In Attorney-client Relationship.

There is no question that Thomas Maile had an attorney/client relationship with Ted Johnson. Thomas Maile had been Ted Johnson's attorney on a variety of matters for approximately 10 years and up until May of 2003 when Beth Rogers wrote a letter declining further representation. Maile owed Johnson the "utmost good faith in fair dealing". *Blough v. Wellman, 132 Idaho* 424, 425, 974 P.2d 70 (1999) citing *Beal v. Mars Larsen Ranch Corp., Inc.* 99 Id. 662, 667, 586 P.2d 1378, 1383 (1978). An attorney is held to strict accountability in the performance and observance of the professional duties of complete fairness, honor, honesty, loyalty, and fidelity in dealing with his clients. A client may hold an attorney liable or accountable for violation of those duties. Dramon v. Herzog, 67 F.3 211, 214 (Idaho 1995). See Also Beal v. Mars Larsen Ranch Corp., Inc. 99 ID 662, 667-668, 586 P.2d 1378, 1383-1384 (1978).

The scope of the attorney's contractual duty to the client is determined by the purpose for which the attorney was retained. Johnson v. Jones, 103 Idaho 702. In the course of Maile's representation of Ted Johnson, he became familiar with aspects of Mr. Johnson's **finances** and property. Mr. Maile represented Mr. Johnson in the negotiations of the potential sale of 40 acres of land he owned on Linder Road; the same land which Maile later purchased and which is the subject of this litigation.

Whether Mr. Maile contends he was representing Mr. Johnson in the capacity of real estate agent or that of his attorney, he cannot on one hand be in a position where he is bargaining to obtain the highest possible price for Mr. Johnson's property (as attorney or realtor), then on the other hand be purchaser, where he would be working for his own interest in getting the lowest price possible for the land. This is especially true where his resulting purchase of the property is for the same amount he had previously declined from another possible buyer stating that the offer was "extremely low" and unacceptable. A man cannot serve two masters; this would create an obvious conflict of interests.

The Idaho Rules of Professional Conduct (as they would have been at the time of the transaction) also indicate that an attorney should not enter into a business transaction with a client unless stringent criteria are met:
Rule 1.8 - Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.
(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

Maile did not comply with IRPC 1.8(a) in that neither Johnson nor his Trustees were given adequate information as to the terms of the agreement and their legal effect. There is a genuine issue of material fact as to whether Maile advised them to get independent counsel. In an Affidavit dated October 20, 2004, Maile for the first time alleges that he did give that advice; however, that statement is refuted by the testimony of Beth Rogers. There is no dispute over the fact that if Maile gave that advice he completely failed to document it in any way, and did not include the advice in the legal documents he prepared relating to the purchase of the Linder Road property. Maile never had them sign anything acknowledging that he had advised them that there was a conflict of interest and that they had been given a reasonable opportunity to consult independent counsel in the transaction.

Maile did not make a full disclosure of all the facts relating to this transaction:

("'Full disclosure' includes a clear explanation of the differing interests involved ... and the advantage of seeking independent legal advice. It also requires a detailed explanation of the risks and disadvantages to the client... including any liabilities that will or may forseeably accrue to him."). Where an attorney takes a position that is actually or potentially adverse to his client, the burden is on the attorney to show that he made a full, affirmative disclosure and acted with the utmost good faith. *Fielding v. Brebbia*, 399 F.2d 1003, 1005 (D.C.Cir.1968) (Because attorney-client relationship provides easy opportunity for attorney to take unfair advantage of client, attorney must prove good faith rather than client proving lack of good faith.), quoting, *Goodrum v. Clement*, 277 F. 586, 591 (D.C.Cir.1922).

Avianca, Inc. v. Cornea, 705 F.Supp 666, 680. See also Restatement (Third) of Law Governing Lawyers. § 122 Client Consent to a Conflict of Interests, Comment c(i) *The requirement of informed consent - adequate information.*

The agreement was not done in good faith and its terms were not fair or reasonable to the client. There is a genuine issue of material fact as to whether the price Maile paid was fair. Maile relies solely on the appraisal by Knipe, which is not reasonable given the fact that he himself had advised his clients, only two months earlier, that in order to determine the market value he should get three opinions from real estate agents and, if possible, get extra opinions from "some" appraisers and to take an average. Exhibit 5.C of Submission of Transcripts. He did not recommend that his client rely on a single appraisal, and cannot use a single appraisal to justify the amount he paid for the property. Maile's own file indicates that he had received notice from Mr. Johnson's accountant that the $400,000 price offered by Witte was far too low, and Mr. Maile himself indicated in his letter rejecting that offer that the offer was "extremely low." Affidavit of Collaer, Exhibit 1 for Exhibit 4 of Rogers Depo.

Plaintiffs have submitted affidavits from Sam Rosti and Richard Zamzow indicating that they would have been willing to pay more than $400,000 for the property. The appraisal conducted by Terry Rudd indicates a value of $820,000 as of September 2002, and an affidavit of Tim Williams submitted by the Defendants indicates a development value which ranges between $1,088,000 and $1,280,000. There is, without question, a genuine issue of material fact as to whether the amount paid by Maile was fair and reasonable.

In addition to paying less than fair market value for the property, the contract terms themselves are adverse to the clients' interests, for the following reasons:

1. Mailed drafted an Earnest Money Agreement which limited the rights of the Trust, waived trial by jury, placed venue in a county different than where the subject property is located, reduced the statute of limitations from five years to one year, and required binding arbitration in lieu of court proceedings. These provisions would be void under I.C. 29-110 even if Maile was not a party to the contract. For him, as an attorney, to draft these provisions into a contract he is entering into with a client falls far short of the professional duties of complete fairness, honor, honesty, loyalty, and fidelity in dealing with his clients. It should be noted that Maile is still indicating he believes he has a right to force this matter into arbitration.

2. There is a genuine issue of material fact as to whether Maile advised of his conflict of interest and gave the client the opportunity to consult independent counsel. His testimony as to unwritten communications with the client are inadmissible, but even if they were admissible in court they are extremely equivocal and were directed only to the question to whether Maile or another attorney would draft the documents. Even if Maile's testimony is taken at face value, it falls far short of the notice which is required by IRPC 1.8.

3. Mr. Johnson was, at the time of this transaction, in a vulnerable position. He was **elderly**, had suffered heart attacks, was injured in falls, and was being treated for lung cancer. It was not reasonable to enter into a transaction which required that he carry a contract on $300,000.

4. Maile failed to provide the client with his own **financial** information, which he had advised Johnson was necessary if he were to consider carrying a mortgage in the Witte transaction. Even worse, after he had been informed that Johnson had suffered a heart attack and was in a nursing home, Maile had Beth Rogers sign an Assignment to Berkshire Investments under which the Mailes were completely absolved of any personal liability for the loan. He did not explain any of this to Beth Rogers, did not provide **financial** information for Berkshire Investments, and acknowledges that at the time, the only asset Berkshire had was “some cash” and a line of credit.

5. Maile did not make changes to the original Deed of Trust as suggested by David Wishney. At some point after the Rogers had signed the closing documents, Maile actually substituted a completely different Deed of Trust that named his friend and colleague as Trustee, instead of Alliance Title, which would have been an independent entity serving in the best interest of the Trust. He did not disclose this to the Trustee. Maile later prepared an expansive Release and Reconveyance that he had his friend Sherer sign as Trustee (again without Beth Rogers knowledge or consent) which purported to release all claims. There was already a lawsuit pending at that time.

There is evidence to indicate that Maile used his knowledge from his representation of Johnson to Johnson's disadvantage contrary to IRPC 1.8(b). As a result of his representation of Johnson (and his Broker status) Maile knew the property was worth a great deal more than what he paid. He used his status as attorney to advise Johnson not to take Witte's offer of $400,000 and then relied on his relationship with his client to purchase it for the same amount. Maile admits that he had been interested in purchasing the property prior to Witte's offer to Johnson. Most troubling is the fact that when the purchase was challenged, Maile indicated that Mr. Johnson was merely “honoring a verbal commitment” to sell the property to Maile. Given the facts, it is reasonable to infer that Mr. Maile used the Witte offer as an opportunity to remind Mr. Johnson of this “commitment.” There is nothing in the records to indicate Maile advised either Johnson or Rogers that such a commitment was not enforceable.

In his deposition, Maile is now saying that he told Johnson there “may be” a conflict and “so if you want, and it's your choice, if you want another attorney to draw up th real estate agreement, you have the right to seek independent counsel to do so, if you want to.” This does not comply with his ethical duty to inform his client of a conflict. This assertion only focuses on who is going to draw up the paperwork, NOT the need for independent counsel before entering into the transaction. Maile acknowledges that this was not documented. However, Maile never mentioned this to Beth Rogers, who was assisting her uncle in the transaction, nor did Johnson tell Rogers that Maile made this assertion. Even if made, these wishy-washy statements were not enough to comply with his duty to fully inform and gain the consent of his client before entering into a business transaction that is adverse to his representation of them as defined in IRPC 1.8(a).

Any transaction between an attorney and client is "subject to close scrutiny and the burden of establishing fairness and equity of the transaction rests upon the attorney." In re Gallop, 85 N.J. 317, 322,426 A.2d 509 (1981); In re Nichols, 95 N.J. 126, 131, 469 A.2d 494 (1984).

Consequently, an otherwise enforceable agreement between an attorney and client is invalid "if it runs afoul of ethical rules governing that relationship." *Cohen v. Radio-Elec. Officers Union,* 146 N.J. at 156, 679 A.2d 1188. In that situation, the lawyer is duty-bound to "make sure that the client understands that the lawyer's ability to give undivided loyalty may be affected and must explain carefully, clearly, and cogently why independent legal advice is required." *P & M Enter. v. Murray.,* 293 N.J.Super. 310, 314, 680 A.2d 790 (App.Div.1996) (holding that a "transaction between a lawyer and client is presumptively invalid").

Petit-Clair v. Nelson, 782 A.2d 960, 962, 344 N.J.Super. 538, 542.

Under the law, Maile and Berkshire's purchase of this property is presumed to be unfair, and the burden of establishment the fairness of the transaction rests on the Defendants. Restatements (Third) of The Law Governing Lawyers; § 126 Business Transactions Between a Lawyer and A Client, states that:
A lawyer may not participate in a business or **financial** transaction with a client, except a standard commercial transaction in which the lawyer does not render legal services, unless:

(1) the client has adequate information about the terms of the transaction and the risks presented by the lawyer's involvement in it;

(2) the terms and circumstances of the transaction are fair and reasonable to the client; and

(3) the client consents to the lawyer's role in the transaction under the limitations and conditions provided in § 122 after being encouraged, and given a reasonable opportunity, to seek independent legal advice concerning the transaction.

Comments to § 126 state in pertinent part:
b. Rationale. A lawyer's legal skill and training, together with the relationship of trust that arises between client and lawyer, create the possibility of overreaching when a lawyer enters into a business transaction with a client. *Furthermore, a lawyer who engages in a business transaction with a client is in a position to arrange the form of the transaction or give legal advice to protect the lawyer's interests rather than advancing the client's interests. Proving fraud or actual overreaching might be difficult. Hence, the law does not require such a showing on the part of a client.*

e. The requirement that the terms of the transaction be fair. *The requirement that the transaction be fair from the perspective of an objective observer derives from the general fiduciary requirement of fair dealing with a client (see § 16(3); Restatement Second, Trusts § 170(2) & Comment w thereto).* Unintended overreaching is a possibility in transactions involving lawyers and their clients. Accordingly a lawyer must overcome a presumption that overreaching occurred by demonstrating the fairness of the transaction. *Fairness is determined based on facts that reasonably could be known at the time of the transaction, not as the facts later develop.* The relative ability of lawyer and client to foresee how the facts might develop, however, is relevant in determining fairness. *An appropriate test is whether a disinterested lawyer would have advised the client not to enter the transaction with some other party.*

f Consent only after encouragement and opportunity to obtain independent legal advice. The client must be encouraged and have a reasonable opportunity to obtain independent legal advice before entering into the transaction. There is no requirement that the client actually consult another lawyer. A client might determine to consult another trusted adviser, such as an accountant, a tax adviser, or a business person, or to consult no one at all.

An opportunity to obtain competent independent advice tends to assure that the client has time to consider the transaction and that the lawyer is not applying undue pressure on the client. By the same token, evidence that a lawyer has not allowed the client opportunity to obtain independent counsel is evidence of overreaching. An independent adviser also can bring an objective eye to the proposed arrangement.

[Emphasis added].

3. Issues and Duties Owed to Former Client.

There is a genuine issue of material fact as to whether Maile represented Mr. Johnson or his estate at the time of his purchase of the Linder property. Maile contends that his representation ended on May 31, 2002, which was less than two months before he offered to buy the land. This contention is not supported by his own billing statements, which show billings to either the Trust or the "Estate of Theodore Johnson" in March of 2003. Most importantly, Beth Rogers has indicated that he was the attorney for the Trust up until she wrote a letter discharging him on May 7, 2003.

The question of whether Maile's representation had ended prior to his purchase is moot. Under the law, he still has a responsibility to a "former client", especially where it involves a matter where he had already represented the client.

At the time of the purchase and sale, the IRPC 1.9 read as follows:
Rule 1.9 - Conflict of Interest: Former Client

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer has acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rules 1.6 or 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rules 1.6 or 3.3 would permit or require with respect to a client.

*(Rule 1.9 amended 3-15-90)

The evidence in this case creates a genuine issue of material fact as to whether Maile has complied with the requirements of IRPC 1.9. There is sufficient evidence to create a strong inference that Maile entered into a contract that was adverse to his former client in the very same matter without advising his "former client" of the aspects of such a contract and gaining his consent to the adverse representation.

The Ninth Circuit US Court of Appeals in Damron v. Herzog, 67 F.2d 211,213 (Idaho 1995) determined that:

> ...we find in the common law a continuing duty owed by attorney to former clients not to represent an interest adverse to a former client on a matter substantially related to the matter of engagement. When such a duty is breached, the former client may bring a cause of action at law.

Herzog, 67 F.2d 211, 213. In this case, attorney Herzog "interposed" himself into a matter substantially related to the one on which he had previously represented Damron, thereby creating a situation wherein the attorney-client relationship re-attaches. Damron argued the duty of loyalty must continue after representation is complete in the same way the duty of confidentiality continues. Damron argued that because the duty of loyalty continues in this respect, Herzog should be subject to a malpractice action for breach of that duty. The Court agreed. In further discussion, the Court stated that,

> For the purpose of Herzog's adverse representation in a substantially related matter, his attorney-client relation with Damron was still in effect. We find it nonsensical to hold that the attorney-client relationship does not remain intact with respect to matters substantially related to the initial matter of engagement.

Damron at 214.

A lawyer still owes a duty to former clients, such as avoiding conflicts of interest. A breach of the duties owed to his client/ former client can be remedied through a malpractice action. See Restatement (Third) of Law Governing Lawyers, § 50 Duty of Care to a Client, comment *c. Clients and former clients.*

The Iowa Supreme Court in *Iowa Supreme Court Board of Professional Ethics and Conduct v. Fay*, 619 N.W.2d 321, also determined that a "client" as referred to in the Disciplinary Rules not only means existing attorney-client relationship but also a person "who regularly reies] on an attorney for legal services... on an occasional and on-going basis." *Committee on Profl Ethics & Conduct v. Carty*, 515 N.W.2d 32,35 (Iowa 1994)., 515 N.W.2d at 35 (quoting Postma, 430 N.W.2d at 392). Thus, an attorney-client relationship "cannot be turned off and on to avoid the rule". *Iowa Supreme Court Board of Professional Ethics and Conduct v. Fay*, 619 N.W.2d 321, 325.

Maile owed a continuing duty to the Johnson Trust on matters in which he had already represented it, such as the sale negotiations of the Linder property. Maile's actions are adverse to his representation of Johnson in the same matter. On one hand "attorney Maile" was trying to obtain the highest price for the property, telling the client that in order to determine the market value he should get three opinions from real estate agents and, if possible, get extra opinions from "some" appraisers and to take an average, declining an offer of $400,000 as "extremely low" and requiring proof of **financial** stability of the person offering to purchase the property. Then in the next breath "purchaser Maile" is buying the property for himself for that "extremely low" amount based on a single appraisal, assigning his right to purchase the property to a business that had no assets, not offering any proof of **financial** stability, and drawing up purchase and sale documents that were to the detriment of the Johnson Trust and very much to Maile's benefit without explaining those facts to the client.

4. Damages as a Result of Breached Duty.

Finally, there is a genuine issue of material fact as to whether the Plaintiffs have been damaged by the Defendants' actions. Maile claims that he paid fair market value, and nothing else matters. This contention is called seriously into contention by his own representation that the $400,000 price was extremely low. Plaintiffs have submitted an appraisal and affidavits which indicate the amount paid was far les than fair market value, and there were others willing, and able to pay far more for the property. See Affidavits of Rosti, Rudd, Williams, and Zamzow.

The Plaintiffs respectfully submit that Defendants' Motion for Summary Judgment on this claim of relief must be denied, as there are many, many genuine issues of material fact.

C. THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER PLAINTIFFS OR DEFENDANTS ARE ENTITLED TO RELIEF ON EQUITABLE GROUNDS

There are also genuine issues of material fact as to whether Plaintiffs are entitled to the equitable remedies of rescission and constructive trust, as well as whether the Defendants are entitled to relief under their claims of estoppel.

1. Rescission

Rescission is an equitable remedy that totally abrogates the contract and seeks to restore the parties to their original positions. *Primary Health Network, Inc. v. State Department of Administration* 137 Idaho 663, 668, 52 P.3d 307, 312 (2002). It is normally granted only in those circumstances in which one of the parties has committed a breach so material that it destroys or vitiates the entire purpose for entering into the contract. *Id.* (citing *Blinzler v. Andrews*, 94 Idaho 215,485 P.2d 957 (1971). Rescission is not available, however, where the breach of contract is only incidental and subordinate to the main purpose of the contract. *Ervin Construction Co. v. Van Orden*, 125 Idaho 695, 700, 874 P.2d 506, 511 (1994). Whether a breach of contract is a factual question is material is a factual question. *Id.*

A party may seek judicial cancellation or rescission of an instrument based on the other party's misrepresentation or fraud. 13 Am. Jur. 2d Cancellation of Instruments § 13. Whether a misrepresentation gives rise to a cause of action for rescission depends upon the materiality of a representation in the circumstances of the particular case. *Id.* A court is particularly inclined to cancel a contract on the ground of fraud in its procurement where a confidential relationship was involved and instrumental in the execution of the contract. *Id.* Not only fraudulent or unfair misrepresentation but also fraudulent or unfair concealment may be sufficient ground for cancellation of an instrument. Even innocent misrepresentation may, under appropriate circumstances, be sufficient to warrant cancellation of an instrument. *Id.*

It is the Plaintiffs' contention that Maile used his position as attorney and realtor with Ted Johnson and then Beth and Andrew Rogers to effectuate the contract which resulted in the Defendants receiving the subject property at an unconscionably low price. Maile was Ted Johnson's attorney for many years. Maile was on notice that the subject property was likely worth far more than $400,000. Affidavit of Collaer, Exhibit 1 for Exhibit 4 of Rogers Depo. On June 4, 2002, Maile wrote a letter to the attorney who was representing Franz Witte, Jr., stating that while the Trust was interested in selling the subject property, the Witte offer was “extremely low,” based on comparable values in the area, but Maile turned around and offered to buy the subject property for the same price. Maile has not offered any documented evidence that he advised Theodore Johnson to seek independent counsel regarding the sale of the subject property to Maile. Rogers testified that Maile never told her than Mr. Johnson should contact another attorney, and that Ted had never told her that Mr. Maile had given that advice to him. Ex. 1D to Submission of Transcripts

Maile drafted the Earnest Money Agreement to include terms which substantially limited the rights of the trust; paragraph 8 on page 2 provides that the parties waive trial by jury; they agree to venue in Canyon County (even though all parties reside in Ada County and that is the location of the real property); no action could be entered if filed more than one year after it accrued (effectively reducing the statute of limitations from five years to one year); and required binding arbitration in lieu of court proceedings. Mrs. Rogers said that Mr. Maile did not discuss any of those provisions with her or in a meeting with her and Mr. Johnson. Ex. 1.G to Submission of Transcripts.

The question of whether or not Maile used his position of confidence as attorney and realtor to induce Ted Johson and subsequently Beth and Andrew Rogers to enter into the contract for the sale of the subject property is a factual one. At the very

least, genuine issues of material fact regarding whether or not Maile used this position of confidence exist, requiring that the Defendants' Motion for Summary Judgment be denied.

Nor can Maile assert that the Plaintiffs waived their right to rescission. When they learned that the Deed of Trust had been paid prematurely and there was a potential that the property would be sold by the Defendants, the Taylors acted promptly in filing their action seeking rescission of the contract. Maile had been notified in July of 2003 that there was intent by the Plaintiffs to file a lawsuit regarding the transaction before he altered his position significantly with respect to the property.

A party who has the right to seek rescission must act in a prompt manner or the right of rescission is waived. *White v. Mock*, _ Idaho _, 104 P.3d 356, 362 (2004). In *White*, the party first prayed for rescission in an amended complaint that was dated approximately twenty-six months after completion of a sale. *Id* at 362. It was clear from the record that substantial reconstruction and remodeling had been done to the property by the time he had filed the amended complaint. *Id.* at 362. The court held that because rescission requires restoration to the status quo, the remodeling efforts rendered rescission an impossibility. *Id.* at 362.

Our case is readily distinguishable from White. Maile knew that there was an intention to file suit in this matter in July of 2003. All actions he took towards the property thereafter were subsequently taken at his own risk.

Rescission is generally only permitted if the parties have not greatly altered their positions and the status quo is restorable. 57 Am. Jur. Proof of Facts 3d 287 § 4 pg. 12. Still, since rescission is a device of equity, the fact that the pre-contract status quo of the parties cannot be restored exactly will not prevent rescission, provided the court is able to adjust the equities between the parties and thereby obtain substantial justice. *Id.* In this case, it is possible to restore the parties to substantially the same position as before the contract was entered into. The Plaintiffs have the ability and intent to restore to the Defendants any money that was tendered in regards to the contract. There is no evidence to support the contention that the Plaintiffs are judgment proof.

Furthermore, rescission is the appropriate equitable remedy because all along the Plaintiffs have wanted the subject property back. The subject property is unique land and any monetary compensation would not place the Plaintiffs back to the pre-contract status. The lis pendens was filed against the subject property to protect the subject property from being transferred to a third party before a court could review a rescission remedy. See Ex. 3; 4. A of Submission of Transcripts. Maile asserts that the sole reason for the lis pendens was that the Plaintiffs were not sure that Maile could pay a judgment against him. This contention is wrong. As noted the lis pendens was filed because the Plaintiffs wanted the subject property restored, and the lis pendens was filed to block a transfer to a third party before a rescission action could be heard.

Rescission is a viable alternative in this case. Maile used his position of confidence to induce Theodore Johnson to enter into the sale contract. The contract is unconscionable. Maile lacks the clean hands to ask that equitable defenses be applied and made any improvements to the property knowing that litigation was not only a possibility but more than likely a reality. He made these improvements at his own risk and should not be able to assert this change in position as a defense to rescission. At the very least, the record establishes that questions of material facts exist in regards to the Plaintiffs' request for rescission and the Defendants' Motion for Summary Judgment should be denied.

2. Constructive Trust

There are also genuine issues of material fact as to whether the Plaintiffs are entitled to the constructive trust remedy.

> Constructive trusts are raised by equity for the purpose of working out right and justice, where there was no intention of the party to create such a relation, and often directly contrary to the intention of the one holding the legal title .... If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out is theory of a double ownership,

> equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner.

Bengoechea v. Bengoechea, 106 Idaho 188, 192-93, P.2d 501, 505-06 (Ct. App. 1984).

A constructive trust requires a showing of wrongful conduct. The record is flooded with examples of Maile's misconduct. Maile wrote a letter to a third party offeror stating the offeror's offer was too low and then turned around and bought the subject property at the same price. There is evidence that Maile was on notice that the property was probably worth far more than $400,000. There is no documented evidence of ever advising Ted Johnson or Beth or Andrew Rogers that he had a conflict of interest and they should seek independent counsel. Maile drafted an Earnest Money Agreement to include terms substantially limiting the rights of the Trust. This is the same Trust that Maile had helped draft and administer. Maile appointed his friend Sherer to be trustee after the closing and without notice to Rogers, then had him sign a "Release and Reconveyance" which purported to release all claims even though there was already one lawsuit pending, he knew Beth had an attorney, he'd sent the attorney a Mutual Release which they never agreed to sign, and he didn't advise any of them he was drafting this broad release language. Maile did not tell Sherer Beth had an attorney. Sherer never discussed the Releases with Beth and admits he owed a duty to protect the Trust and had no authority to release anything on its behalf. Clearly Maile obtained legal title to the subject property by fraud, he obtained legal title by utilizing his position of confidence with Ted Johnson and Beth and Andrew Rogers, and he obtained legal title by violating his fiduciary duties. As such the appropriate remedy is a constructive trust in favor of the Plaintiffs.

3. Defendants' Claim to Equitable Remedies.

The Defendants have raised two equitable defenses. However, the Defendants are precluded from relying on any such equitable defenses, in part, because of the equitable doctrine of unclean hands. This doctrine is based on the maxim that, "he who comes into equity must come with clean hands." *Dennett v. Kuenzli, 130 Idaho* 21,27, 936 P.2d 219, 225 (Ct. App. 1997). It allows a court to deny equitable relief to a litigant on the ground that his conduct has been "inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue." *Id.*

It has been the Plaintiffs' contention that Maile has breached fiduciary duties and engaged in legal malpractice and realtor negligence throughout the entire course of proceedings that ultimately led to the sale of the subject property from the Trust to Maile. For example, Maile acknowledges that he did not provide Mr. Johnson with a copy of the agency disclosure brochure adopted pursuant to Idaho Code 54-2085. Ex. 5.G to Submission of Depo Transcript and Exhibits. Rogers testified that Maile never told her than Mr. Johnson should contact another attorney, and that Ted had never told her that Mr. Maile had given that advice to him. Ex. 1D to Submission of Transcripts. Maile does not claim to have had any conversation with Rogers about his conflict of interest after she became a successor trustee. Ex. 5.H to Submission. Maile lacks the clean hands required to assert equitable defenses. Again Maile breached numerous duties and responsibilities that he owed the Plaintiffs in this transaction. This inequitable conduct precludes him from asserting any equitable defenses against the Plaintiffs.

a. The Defendants Are Not in the Position to Ask the Court to Apply Equitable Estoppel Against the Plaintiffs.

The elements of equitable estoppel, to the party to be estopped, are:

1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;

2) intention, or at least expectation, that such conduct shall be acted upon by the other party;

3) knowledge, actual or constructive, of the real facts.

Treasure Valley Gastroenterology Specialists, P.A. v. Woods, 135 Idaho 485, 490, 20 P.3d 21, 26 (2001).

The Plaintiffs never represented to Maile that they would not pursue litigation regarding the sale of the subject property to Maile. Maile claims that the Defendants relied on the letter written by Beth Rogers to the beneficiaries that no legal action would be taken upon Maile and spent time and money developing the subject property. Maile was, however, well aware of the fact that a number of the beneficiaries continued to be upset over his purchase of this property for far less than it was worth. At the time he chose to pay the loan off early, he was in contact with both Beth Rogers and her attorney, and knew that they were planning to step aside so the lawsuit could be pursued in the name of the trust.

The Plaintiffs did not conceal facts. The letter by Rogers was directed to the beneficiaries, not to Maile. The letter was certainly not written in the attempt to induce Maile to spend money and time developing the subject property. As an attorney, Maile knew, or should have known, that a mere letter from the trustee to beneficiaries, in which the trustees admit they have a fiduciary duty and that duty might be in violation, are not going to pursue litigation does not extinguish the possibility of litigation regarding the transaction. The fact that the trustees and beneficiaries were at odds leads a reasonable attorney to the opposite conclusion, that litigation, or some sort of challenge, was inevitable. No misrepresentation or concealment by the Plaintiffs, let alone the intent that the Defendants rely on said misrepresentation or concealment, exist to justify equitable estoppel.

Furthermore, Maile was aware that litigation was intended. As related to the party claiming the estoppel, they are:

1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question;

2) reliance upon the conduct of the party estopped; and

3) action based thereon of such a character as to change his position prejudicially.

Treasure Valley, 135 Idaho at 490, 20 P.3d at 26.

Maile had been informed in July of 2003 that the beneficiaries of the Theodore Johnson Trust were challenging his purchase of the property. The Plaintiffs never represented to Maile that they would not sue in regards to the subject property. As an attorney, Maile knew, or should have known, the transaction was questionable and did know that the beneficiaries were objecting. He admits that he made no effort to contact the attorney who had written the initial letter indicating that his purchase was being challenged. Because of his knowledge of the beneficiaries' desire to challenge the sale of the subject property and the fact that the Plaintiffs' never represented to Maile that no suit would be filed, and made no attempt to induce Maile to act, Maile cannot assert equitable estoppel.

b. The Defendants Are Not Able to Assert Quasi-estoppel.

Quasi-estoppel precludes a party from asserting to another's disadvantage a right inconsistent with a position previously taken by him or her. The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced or of which he accepted a benefit. The act of the party against whom the estoppel is sought must have gained some advantage to himself or produced some disadvantage to another; or the person invoking the estoppel must have been induced to change his position. *Garner v. Bartschi*, 139 Idaho 430, 437, 80 P.3d 1031, 1038 (2003).

Quasi-estoppel requires unconscionable behavior. The Plaintiffs have not acted unconscionably. The same arguments as set forth in regards to why equitable estoppel does not apply also apply to quasi-estoppel. Maile is the only party who has acted unconscionably in this case. Maile is the one who took advantage of his role as attorney and realtor and fraudulently induced

Ted Johnson into entering into the real estate contract for the sale of the subject property. The Plaintiffs never represented to Maile that they would not pursue litigation.

Maile is the party who concealed facts. Beth and Andy Rogers signed a standard form Reconveyance to Alliance Title. Ex 1J to Submission of Transcripts. At some point after the closing, Maile substituted a different Deed of Trust which named Stephen Sherer as the Trustee. Maile and Sherer have been friends since 1986 or 1987, have socialized, belonged to the same group, and have shared each others' calendars. Ex. 2.A to Submission of Transcripts. Maile did not disclose to Rogers that he had changed the deed of trust from listing Alliance Title to naming his friend as the trustee under the DOT. (Ex. 1J and Ex. 5.J of Submission of Transcripts). In fact, Beth Rogers had never seen the DOT with Sherer named as trustee prior to her continued deposition on February 1. Ex. 1.J of Submission of Transcripts. The Plaintiffs have not gained any advantage over Maile nor did they induce Maile to change his position. The Plaintiffs only seek to protect the Trust property. The facts of this case establish that quasi-estoppel is not an appropriate defense to the Defendants.

D. MOTION FOR PARTIAL SUMMARY JUDGMENT ON MAILE'S LIABILITY AS A REALTOR

There are genuine issues of material fact as to whether Maile was negligent in his capacity as a realtor. These issues require that the Defendants' Motion for Partial Summary Judgment be denied.

1. Expert Testimony.

The Plaintiffs have submitted an Affidavit from Dick White, a real estate broker in Idaho for over 14 years, which states an expert opinion that Maile failed to meet the standard of care required of real estate professionals in his handling of the purchase from the Johnson Trust. The Plaintiffs previously submitted the Affidavit of Dennis McCracken, who also set forth the standard of care for realtors.

These affidavits are not only appropriate, they are mandatory under the holding of Samuel v. Hepworth, 134 Idaho 84, 89 (1999), *citing Jarman v. Hale*, 112 Idaho 270, 273, 731 P.2d 813, 816 (Ct. App. 1986). In that case, the Idaho Supreme Court acknowledged that expert testimony is required in malpractice actions against attorneys and other professionals whenever "the factors involved ordinarily are not within the knowledge or experience of laymen composing the jury." *Id.* The only time expert testimony is not necessary is when the professional's breach of duty of care. The case of *Rockefeller v. Graybow* 136 Idaho 637, 39 P. 3d 577(2001) does not stand for the proposition that expert testimony is inadmissible as a matter of law whenever there is a question before a jury (or other finder of fact) of a real estate broker or agent's breach of an applicable duty. The decision in *Rockefeller* focused upon a district court's evidentiary decision "excluding *Rockefeller's* experts who would testify on the fiduciary duties of real estate agents..." 136 Idaho 645, 39 P. 3d 585. The Supreme Court observed that "the standard of care of an agent is clearly established by prior case law in this Court... the jury could readily apply the facts to the legal standard without the assistance of expert testimony." 136 Idaho 647, 39 P. 3d 577. The governing proposition of Rockefeller is that issues of law, such as the definition of a legal duty, need not be defined by expert witnesses.

Where expert testimony is not only admissible, but arguably required, is to provide facts, background, data, and explanations that will assist a finder of fact in determining Maile breached these duties arising under law. *See* I.R.C.P. 702. Significantly, the Idaho Supreme Court has expressly recognized that real estate agents are "qualified to testify to things outside the common knowledge of the jury by virtue of their specialized knowledge and experience." *Boel v. Stewart Title Guaranty Co.*, 43 P.3d 768, 773, 137 Idaho 9 (2002). In the case at bar, Mr. White and Mr. McCracken both give testimony on several subjects of which they are familiar due to their extensive background and experience in the real estate industry, but that are outside the scope of the common experience of people that do not work in the real estate industry.

Finally, I.R.E. 704 clearly allows leeway for expert testimony notwithstanding the fact that it may "embrace an ultimate issue to be decided by the trier of fact." To the extent White and McCracken see a breach of duty, such testimony serves primarily to illustrate the bounds of relevant industry practices and standards and should be admissible for those purposes.

Unless this Court finds that Mr. Maile's breach of the duty of care was so obvious that it is within the ordinary knowledge and experience of laymen, expert affidavits are required. The Affidavits of Dick White and Dennis McCracken create a genuine issue of material fact as to whether Maile was negligent in his capacity as a real estate professional.

2. Maile's Duty to Enter into a Written Representation Agreement.

Defendant Thomas Maile, in his Memorandum in Support of his Motion for Partial Summary Judgment, acknowledges that the Idaho Real Estate Brokerage Representation Act (hereinafter referred to as "Act") governs this transaction, but argues that all claims based on his status as a realtor must be dismissed. The argument behind this position is that because no written representation agreement exists, no agency relationship between the Trust and Defendant Thomas Maile exists, and as such, Defendant Thomas Maile is not liable to the Trust in his capacity as a realtor.

This position is based on an incomplete reading and application of the Act to the facts of this case. A look at the Act in its entirety establishes that there is a genuine issue of material fact as to whether Defendant Thomas Maile is liable for negligence to the Trust, and thus this motion should be denied.

Defendant Thomas Maile's position is based solely on the fact that there was not a written representation agreement between himself and the Trust. He contends that pursuant to the Idaho Real Estate Brokerage Representation Act, no agency relationship existed and thus he is not liable to the Trust for his negligence in his capacity as a realtor. This position is contrary to the Act itself, and applying the facts of this case to the Act establishes Defendant Thomas Maile's negligence to the Trust.

The Trust contends that Mr. Maile's negligence included, but was not limited to, the failure to obtain a listing agreement and actively market the real property for sale, as well as failure to comply with the requirements of Title 54, chapter 20 "Idaho Real Estate License Law" ("The Act.")

Under I.C. § 54-2055(1), "Any actively licensed Idaho broker, sales associate, or legal business entitle shall comply with this entire chapter when that licensee if buying, selling or otherwise acquiring or disposing of the licensee's own interest in real property in a regulated real estate transaction." The Act places an affirmative duty on a realtor to properly obtain a written representation agreement and a breach of this duty is a violation of Idaho real estate law. Under I.C. § 54-2085(1), A real estate broker or salesperson (referred to as a "licensee") is required to give to a prospective seller at the first substantial business contact the agency disclosure brochure adopted or approved by the Idaho real estate commission. The failure of a licensee to timely give a buyer or seller the agency disclosure brochure *or* the failure of a licensee to properly and timely obtain any written agreement or confirmation required is a violation of the Idaho real estate law and may subject the licensee to disciplinary action according to the provisions of sections 54-2058 through 54-2078, Idaho Code. I.C. 54-2085(5) (emphasis added). A true and correct copy of the agency disclosure brochure which was in effect at the time of this transaction is attached as an Exhibit to the Affidavit of Donna M. Jones, Executive Director of the Idaho Real Estate Commission.

After receiving the Witte offer, Ted Johnson turned the potential sale of the subject property over to Defendant Thomas Maile. After the Trust received the Witte offer and Defendant Thomas Maile met with Mr. Johnson regarding the potential sale of the subject property, Defendant Thomas Maile had an affirmative duty to enter into a written representation agreement with the Trust. His failure to do so constitutes negligence and is in direct violation of I.C. 54-2085(5). Defendant Thomas Maile cannot claim that no agency relationship existed and thus he had no duties to the trust because of his negligent conduct.

The breach of this duty directly caused the Trust considerable damages. Had there been a written representation agreement and had Defendant Thomas Maile fulfilled the legal duties and obligations owed to a seller, this property would have sold for

a substantially higher amount. Sam Rosti, a silent partner in the Witte offer, would have increased the amount of their initial offer had he known that the subject property was still for sale. Richard Zamzow, a prominent Boise businessman with extensive experience in property development, would have been willing to pay between $25,000 and $30,000 per acre if he had known the property was available - a sale price of between $1million and $1.2 million, as compared to the $400,000 paid by Mr. Maile.

Defendant Thomas Maile, as a realtor, breached his affirmative duty to enter into a written representation agreement with the Trust that the Idaho Real Estate Representation Act expressly requires and his duty to actively market the property. Instead of marketing the property, Defendant Thomas Maile told Mr. Johnson that he looked but could not find any prospective purchasers, and then himself purchased the subject property for the very same price that he had earlier characterized as "extremely low," and without providing the **financial** records he had insisted Mr. Witte provide. It is the Trust's position that Defendant Thomas Maile was negligent and urges that the court deny this Motion for Partial Summary Judgment.

3. Maile Failed to Fulfill His Duty to the Trust as a "Customer"

In the alternative, even if no agency relationship existed and looking past Defendant Thomas Maile's negligent conduct in not entering into a written representation agreement with the Trust, Defendant Thomas Maile is still negligent as a realtor under the terms of the Idaho Real Estate Brokerage Representation Act.

Defendant Thomas Maile adopts the position that the relationship between himself as a realtor and the Trust is that of a "customer" rather than a "client." The Act addresses the duties that a realtor owes to a customer and in pertinent part states:
If a seller is not represented by a brokerage in a regulated real estate transaction, that seller remains a customer, and as such, the brokerage and its licensees are nonagents and owe the following legal duties and obligations:

(a) To perform ministerial acts to assist the buyer or seller in the sale or purchase of real property;

(b) To perform these acts with honesty, good faith, reasonable skill and care;

(e) to disclose to the seller/customer all adverse material facts actually known or which reasonably should have been known by the licensee.

I.C. § 54-2086(1)(e).

Even if the Trust is considered to be a "customer," as Defendant Thomas Maile contends, then he had the affirmative duty to perform ministerial acts to assist the buyer or seller in the sale or purchase of real property; to perform these acts with honesty, good faith, reasonable skill and care; and to disclose to the Trust any and all "adverse material facts" actually known or which reasonably should have been known to Defendant Thomas Maile. "Adverse material fact" means a fact that would significantly affect the desirability or value of the property to a reasonable person or which establishes a reasonable belief that a party to the transaction is not able to or does not intend to complete that party's obligations under a real estate contract. I.C. § 54-2083.

Before entering into the Earnest Money Agreement with the Trust, Defendant Thomas Maile, because of his status as a realtor, should have disclosed to the Trust that the Knipe appraisal was defective. That appraisal made no attempt to value the land for development purposes, and consequently valued the subject property at too low a price. Maile knew that the subject property was worth far more than the price in the Earnest Money Agreement; he had written a letter rejecting the exact same amount because it was "extremely low" based on comparable sales in the area.

As stated in Dick White's affidavit, in dealing with a customer a realtor has a duty to be familiar with property values in the area and give honest and good faith estimations as to property value. If an appraisal has apparent flaws which would adversely impact the value of the property, it is the standard of care for a real estate professional to discuss those problems with the seller

to assure that an appraisal is an accurate reflection of fair market value. Richard White and Dennis McCracken's affidavits establishes the fact that any competent realtor with a knowledge of real property transactions in the area at the time would have recognized the defects in the appraisal and advised the seller that the appraisal was too low. Additionally, based upon his professional expertise and experience, Mr. McCracken states that any competent realtor would have known that the subject property was worth far more than the $400,000 is was sold for.

These are adverse material facts that would have affected Mr. Johnson's view on the worthiness of the Earnest Money Agreement. If Mr. Maile had performed his duties with honesty, good faith, reasonable skill and care, the other relevant sales should have been disclosed to Mr. Johnson. This breach of the affirmative duties the Act places on Maile is a direct and proximate cause of the Trust's damages and establishes his negligence as a realtor.

Defendant Thomas Maile adopts the position that the Trust was merely a “customer” and that he did not violate any duties that he owed to the Trust. There are genuine issues of material fact on this issue which require the court to deny the Motion for Partial Summary Judgment.

E. THE TRUST IS ENTITLED TO ITS ATTORNEY FEES AND COSTS

The facts in this case establish beyond a doubt that there are many genuine issues of material fact which make Summary Judgment improper. The Trust respectfully requests that this court award it costs and attorney fees incurred in this matter under I.R.C.P. 12-121, 12-123, and I.R.C.P. 11.

IV. CONCLUSION

There are genuine issues as to the material facts of this case and the Defendant Thomas Maile is not entitled to a judgment as a matter of law. The Plaintiff Trust respectfully requests that this Court DENY Defendant Thomas Maile's Motions to Dismiss, for Summart Judgment, and for Partial Summary Judgment.

DATED this 2nd day of March, 2005.

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